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No. 10,526

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AL C. FOX, COLLISON GILBRETH, R. E. SUTTON, ORVILLE HUTCHINS, JOHN S. JONES, NEPHI N. DUSTIN, MERRILL C. HUTCHINS, H. M. CHILDERS, WARREN S. MORDEN, EDWARD F. O'NEILL, PHILIP EDGAR FERRIS,

Appellants,

vs.

SUMMIT KING MINES, LIMITED (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

AS TO APPELLEE'S STATEMENT OF PLEADINGS AND STATEMENT OF FACTS CONCERNING JURISDICTION.

Counsel for the Appellee states on page 2 of their brief that it was "the company's position prior to April 22, 1941, to give all of the plaintiffs who were employed in the mill one hour's free time within which to eat their lunch or in which they might occupy themselves as they saw fit, free of all duties and that the men did utilize this free time in eating

lunch, resting, reading, changing their clothes and taking showers''; that after April 23, 1941, that period was reduced to forty-eight or forty-nine minutes.

It seems that the Appellee is attempting to justify the withholding of one hour's compensation prior to April 22, 1941, and forty-eight and forty-nine minutes after said date by spreading the time by piecemeal over the entire shift.

If such a proposition could be maintained under the provisions of the Fair Labor Standards Act, it would be impossible to enforce the Act in such employments as that engaged in by the Appellants or others engaged in similar employments. It would require a lot of timekeeping to determine when employment time ended and rest time commenced.

AS TO APPELLEE'S STATEMENT OF THE CASE.

The Appellants were employed to work a continuous eight hour shift and their duties and responsibilities were not regulated by a watch but by the operation of the mill.

When the Appellants were hired, the management knew what the practice and custom was in that particular character of work:

> ''Only about 50% of these men's time was occupied in manual labor, the remaining part of their working time was occupied simply in overseeing the various machines and processes to see that the

mill was functioning properly. (Rec. 86, 184-185.)" (Appellee's Brief, page 5.)

There would be as much justification in withholding fifty per cent of their wages as one-eighth.

AS TO APPELLEE'S ARGUMENT: WAS THE DISTRICT COURT JUSTIFIED BY THE EVIDENCE IN FINDING THAT APPELLANTS WERE NOT ENTITLED TO ANY OVERTIME PAY?

As to the Appellee's contention on that point, we would reply that the services of the Appellants consisted of two functions: keeping the machinery running and the ore or pulp moving through the mill. If those functions were being performed by the Appellants, then the Appellee was receiving the benefit of their services during each hour from the commencement of the shift and until relieved by the man on the next shift. His responsibilities never ceased nor his duties relaxed while the mill was operating on each man's shift even though he might be eating, reading, changing clothes, or otherwise engaged.

Interpretive Bulletin No. 13, was not in evidence in the instant case, but is mentioned in Appellee's Brief, page 23, and cited in one of Appellee's cases: *Mortenson v. Western Light and Telephone Co.* (D.C.S.D. Iowa W. Div. 1941, 42 Fed. Supp. 319), where an extract from said Bulletin 13 reads:

> "As a general rule, hours worked will include all time during which an employee is required to be on duty or to be on the employer's premises, or to be at a piece work place, and all time during

> which an employee is suffered or permitted to work whether or not he is required to do so."

Appellee cites the case of *Gordon v. Paducah Ice Mfg. Co.,* 41 Fed. Supp. 980, wherein that Court cited other cases including *Chicago, R.I.&P.R. Co. v. United States,* 253 Fed. 555, which defines waiting time as applied to the Hours of Service Act of March 4, 1907, 34 Stat. 1415, and which we believe is applicable to the case at bar insofar as the Appellee claims that the Appellants had an hour free from all supervision during their shift. (Appellee's Brief, page 20.)

In the last mentioned case the Court provides a rule for determining as to whether or not a man is free from duty and supervision and which is stated as follows:

> "The understanding between him and the company, and the practice, was that though at some time he should have his hour off, it was alterable and adjustable to the needs of the office; also that, while off duty during the hour, he was subject to recall by the company whenever its business required. It is clear that the time allowed was so uncertain and restrained that it was not a period for refreshment, rest, and recreation within the meaning of the law. It was not his own, to occupy as he deemed best. He was at his company's beck at any time, and might even be called to the office from the table. He was not free to go from his home beyond reach of a summons to active duty, but had to hold himself within call and in readiness to respond at any moment. Instead of that sense of freedom essential to mental and physical

> relation, a tenseness was imposed as by an alarm clock sounding peremptorily, but with uncontrolled regularity. The hour of rest and refreshment was dominated by the business requirements of the company. * * *
>
> The arrangement between them and the practice determined their relation, and whether the operator should be regarded as free or on continued duty. This conclusion is in harmony with the decisions of this and other courts."

There is probably no fixed and definite rule by which to determine whether or not the employee comes within the term "employ" which includes "to suffer or permit to work".

The cases cited by Appellee as well as the one at bar must be determined by the character of work and the usual practice and custom in connection with it.

The Appellants were required to account for each hour of an eight hour shift on a work report sheet, samples of which were sent up from the trial Court as exhibits.

The Appellants naturally had enough pride in their work and wanted to be able to turn in a satisfactory report for each hour of their shift.

In the case of *Skidmore v. Swift & Co.,* 136 Fed. (2d) 112, cited in Appellee's Brief, pages 13, 15 and 16, the plaintiffs voluntarily spent several hours during the weeks at the fire hall in order to be available in case of an alarm but time so spent was irregular, and in addition to their regular hours of employment.

Such overtime was apparently gratuitous as they had no specific duties to perform except to answer an alarm and which occurred only rarely.

They were not under any responsibility or required to give any service that could be called "work" and were evidently paid for their regular hours of employment.

The case of *Brown v. Carter Drilling Co.,* 38 Fed. Supp. 489, Appellee's Brief, page 32, was that of a watchman employed to protect idle oil rigs from the elements, theft and pilfering and claimed to have been employed for 24 hours per day but the evidence showed that he only worked 14 hours per day and the idle rigs were not producing goods for commerce.

The distinguishing features of the case of *Gordon v. Paducah Ice Mfg. Co.,* 41 Fed. Supp. 950, Appellee's Brief 28, are that the employees were free to report or not to report as they wished and free to leave at any time they wished without discrimination and might return later for any work that was available.

It seems that the icing of refrigerator cars were separate jobs, that is to say, the men iced the cars that were ready for icing and when finished the men could leave the job or wait until another car was ready. The foreman picked his men from those present to service the car when it was ready and endeavored to spread the work with as many men as possible. (Page 984.)

The Appellee cites two mining cases where the lunch period was excluded from the hours worked but the facts in those cases are considerably different from the case at bar.

Mining as a general rule is not a continuous operation for 24 hours a day, like milling or smelting, but is usually for one or two shifts of eight hours each during a day and sometimes a lunch period is added onto the eight hours and blasting is usually performed during the lunch period or at the end of a shift as time must elapse after blasting to permit the smoke and fumes to be carried out of the mine by natural or forced ventilation. Miners, muckers, trammers, timbermen, and other employees could not immediately enter the places where blasting occurred or until the air was cleared. For such reasons the work of mining can readily be arranged so that it can be discontinued for a definite period so that all of the employees can eat their lunches at the same time. The services of the employees are generally suspended for such lunch periods so that mining is not as a rule analogous to the continuous operation of a mill such as operated by Appellee.

In the case of the *Tennessee Coal, Iron & R. Company v. Muscoda Local 123, et al.,* 40 Fed. Supp. 4-11, there were contracts between the unions and the companies and which excluded the lunch period. It also appears from the decision, page 7, that the miners went to work at 9:45 A.M. and worked to 3:15 P.M., a total of eight and one-half hours and that thirty minutes of that time was for a lunch period. Accord-

ingly under the agreements between the unions and the company, the lunch period of one-half hour was added on to the total hours worked and during which period the men were relieved of all duties. In the case of *Sunshine Mining Company v. Carver,* 41 Fed. Supp. 60, the trial Court reached its conclusion and based its decision upon the theory that one would not be working while he was eating his lunch or resting for he is not, at that time, rendering any service.

The facts in that case show that the company blasted during the lunch period and also provided tables and other conveniences for the men at some distance from where they were working and it was customary for the miners to retire to such places for the lunch and the men underground were allotted 35 minutes for their lunch period.

We believe that there is no analogy or comparison between the two cases cited above involving miners and the instant case for the obvious reason that the miners could not render any service to their employer while blasting was going on nor while they were eating lunch as their work consists of manual work by the use of their hands and they were relieved of all duties and responsibilities during that lunch period. On the other hand, the Appellants were rendering services to the Appellee during the time they were eating their lunch by keeping the mill running and the ore flowing so that the Appellee received the benefits from the continuing process without interruption.

AS TO APPELLEE'S ARGUMENT: WERE APPELLANTS DURING THEIR EMPLOYMENT BY APPELLEE ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT?

Counsel for Appellee devotes a considerable part of their brief in trying to substantiate the opinion of the District Court in the case of *Holland v. Haile Gold Mines, Inc.* (W.D., S.C.), 44 Fed. Supp. 641. The principles enunciated in that case by the trial judge holding that the shipments of gold by the mining company to the mint were administrative acts of the government and which did not constitute commerce within the meaning of the Fair Labor Standards Act and which opinion was concurred in by Judge Norcross upon the trial of the instant case, *Fox, et al. v. Summit King Mines, Limited,* 48 Fed. Supp. 952.

However, the Fourth Circuit Court of Appeals in the case of *Walling, Adm'r of Wage and Hour Division, U. S. Department of Labor, v. Haile Gold Mines, Inc.,* 136 Fed. Rep. (2d) 102, an action for injunction to restrain the Haile Gold Mines, Inc. (same company as above), from violating the provisions of the Fair Labor Standards Act, expressly overruled the propositions of law involved in the cases of *Holland v. Haile Gold Mines, Inc.,* and *Fox, et al. v. Summit King Mines, Inc.* (the instant case), that the shipment of gold by the mining company from one state to the U. S. Mint in another state was not an administrative act of the government but constituted interstate commerce for the reason that under the Gold Act, gold may also be

used for industrial, professional and artistic purposes, and also, for the reason that the power of exclusion from interstate commerce does not depend on the commercial nature of the article or the existence of competition.

Counsel for Appellee fails to refer to or discuss the opinion of the Eighth Circuit Court of Appeals in the case of *Canyon Corporation v. National Labor Relations Board,* 128 Fed. (2d) 953, referred to in our opening brief on pages 15 and 35, and which is to the same effect as the opinion of the Fourth Circuit Court of Appeals in the case of *Walling v. Haile Gold Mines, Inc.,* mentioned above.

CONCLUSION.

We believe the trial Court made erroneous findings of fact and conclusions of law by reasoning from the law of master and servant instead of applying the principles of law and declared policy of Congress applicable to the Statutory Act of Congress known as the Fair Labor Standards Act of 1938, and that the Court erroneously interpreted the Gold Reserve Act of 1934, and therefore the judgment of the trial Court should be reversed.

Dated, Reno, Nevada,
December 20, 1943.

Respectfully submitted,
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Attorney for Appellants.